

Office of the Presiding Officers  
Military Commission  
June 1, 2006

**SUBJECT: Presiding Officers Memorandum (POM) # 17 - Rules for Appearance, Excusal, and Relief or Withdrawal of Counsel**

**1. References:**

- a. Military Commission Order 1, 31 August 2005.
- b. Military Commission Instruction 4, 16 September 2005.
- c. Military Commission Instruction 8, 16 September 2005.
- d. Appointing Authority Regulation 3, 17 November 2004.

**2. Purpose.** This POM governs the entry of appearance of counsel, appearances, excusal, and relief or withdrawal of counsel.

**3. Applicability.** This POM is applicable to all counsel, military and civilian, practicing before these Commissions.

**4. Definitions.** The following definitions are applicable.

a. Appearance - Counsel have made an appearance on behalf of either the United States or an accused when one of the following occurs:

(1) Detailed Counsel - Detailed by proper authority, to a case which has been referred for trial by a military commission.

(2) Civilian Counsel (CC) - Qualification by the Chief Defense Counsel (CDC) and filing a Notice of Appearance, thru the CDC, with the Assistant to the Presiding Officers (APO) and the Presiding Officer (PO) in a particular case.

b. Excusal - Permission given by the PO to a counsel who has entered an appearance to be absent from a session of the proceedings.

c. Relief/Withdrawal - The termination of all representational responsibility of a detailed counsel or a qualified civilian counsel after entering an appearance.

**5. Detailing and Appearance.**

a. Military Counsel.

(1) Upon being detailed to a case, counsel will provide copies of the detailing documents to the APO, PO, and, if known, to opposing counsel.

(2) Pursuant to paragraphs 4.C.(2) and (4) of reference 1(a) above, paragraphs 3.D.2) and 3) of reference 1(b), and this POM, Detailed Defense Counsel (DDC) represents the interests of an accused upon detailing.

(3) If the DDC believes that his/her representation of an accused is prohibited because of ethical or other considerations, s/he shall, within seven days of becoming aware of the matter which caused this belief, take affirmative actions to resolve this perceived problem. These steps are not limited to, but should include one or more of the following:

(a) Providing a memorandum to the CDC explaining the problem and asking for the CDC's assistance in resolving the problem, and/or,

(b) Requesting an opinion from the Judge Advocate General/Staff Judge Advocate to the Commandant of the service to which the DDC belongs on the propriety of the DDC representing a particular accused, and/or,

(c) Requesting an opinion from the licensing authority in the jurisdiction(s) in which the DDC is licensed on the propriety of the DDC representing a particular accused.

In addition to taking any of the above actions or any others, the DDC will immediately advise the PO of the perceived problem and the steps which the DDC has taken to resolve or clarify the perceived problem.

(4) When the DDC has legal authority from an appropriate body (licensing authority, service TJAG) that his/her representation of the accused is impermissible, s/he will file a motion with the PO requesting appropriate relief. Upon receipt of such motion, the PO will determine the action to be taken, considering the provisions of reference 1(d) above.

(5) Until the DDC is relieved from his/her duty of representation by competent authority, the DDC will continue to represent the interests of an accused. These directions will take into account the matters raised by the notification provided as required by paragraph 5(a)(3) above and any motion filed under the provisions of paragraph 5(a)(4) above.

(6) Under the provisions of reference 1(b), it is the responsibility of the CDC to provide representation for an accused at all times by detailing a qualified defense counsel. If the DDC is relieved for any reason, the CDC is responsible for providing an immediate replacement.

b. Civilian Counsel. If an accused retains (as that term is used in reference 1(c) above) CC, the DDC shall provide CC a copy of Enclosure (1), Notice of Appearance. CC shall submit written notice of representation as counsel of record for the accused by email to the PO via the CDC using the format found at Enclosure (1). The notice must contain the name of the accused, counsel's name, office address, telephone number, facsimile number, e-mail address, and jurisdiction(s) where the counsel is presently admitted to practice. Additionally, the CDC's approval package of CC practicing before Commissions will be attached to the Notice of Appearance. Upon qualification by the CDC and filing of a Notice of Appearance, CC will be deemed to have entered an appearance with the Commission.

c. Other Assistants to Counsel. If a party has assistant(s) who will be present at a commission session or trial and the party desires the assistant's presence at counsel table, the party will notify the APO, PO, and opposing counsel of the identity of the assistant and the capacity in which the assistant will serve.

**6. Presence of Counsel at Commission Sessions.** The following rules govern the presence of counsel at Commission sessions.

a. As a general rule, all detailed counsel and CC who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. Notwithstanding the forgoing, the PO may excuse counsel's presence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking excusal from a session will request permission from the PO and provide written evidence of the waiver by the client. See paragraph e below. The "client" for the purposes of the prosecution shall be the Chief Prosecutor or the lead prosecutor. See paragraph e(2) below.

c. Because a closed session may be required at any session and that could occur without warning, at least one DDC must attend all Commission sessions.

d. If a counsel's presence is waived by the client and excused by the PO, that excusal will not limit the business that is scheduled to be accomplished at the session for which a counsel has been excused. For example, if the Commission is scheduled to hear motions, the fact that a client has waived the appearance of a counsel would not allow a party to defer or avoid litigating a motion because the excused counsel is not present. Similarly, consideration of matters that arise during a session in which a counsel's presence has been waived will not be subject to deferral simply because of the absence of the counsel whose presence has been waived.

e. The notice of waiver to the PO will be submitted by e-mail and will contain the following information:

(1) In the case of the defense, a signed waiver by the accused must be provided to the PO in advance of the scheduled session. The waiver must indicate that:

(a) The accused is expressly waiving the presence of a named counsel for the scheduled Commission Session and be signed by the accused, DDC, and the lead defense counsel if other than the DDC. The waiver will be in English or, if the original is in a language other than English, translated into English.

(b) The accused and lead counsel for the defense and the counsel seeking to be excused, are aware that excusal of the counsel does not permit delay or deferral of business of the Commission because the counsel is excused, and that another counsel for the defense who will be present can fully address and litigate, if necessary, any business of the Commission.

(c) The accused understands that another of his defense counsel is responsible for ensuring all business of the Commission can be conducted at the session.

(d) The request is not for the purposes of seeking delay and will not, in fact, delay Commission proceedings.

The format contained at Enclosure (2), Waiver of Counsel, may be used by the defense.

(2) In the case of the prosecution, the waiver must be approved by the Chief Prosecutor or lead prosecutor. The excusal of a prosecutor for a particular session will not limit the business to be conducted at that session whether anticipated or not.

f. In lieu of the signed waiver directed by paragraphs 6b and 6e above, the client may, at a session at which the civilian counsel is present, state that the civilian counsel's presence is waived for all subsequent sessions at which the civilian counsel does not appear. The client must state that he understands those matters addressed in paragraph 6e(1)(b) above and specifically that he understands that other matters may be handled at such sessions which would normally have been handled by the civilian counsel and that he waives such advice and assistance.

g. In cases in which there has been an on-the-record or written waiver of the future presence of civilian counsel at sessions, the civilian counsel will not be required to be present at all sessions.

h. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the civilian counsel, the civilian counsel will be required to be present at all subsequent trial terms of the commission. Alternatively, the civilian counsel may request to withdraw from the case completely, and the request will be granted at the discretion of the PO. Any such revocation of waiver by the accused during a given trial term will not require the civilian counsel's presence during the trial term at which the revocation of waiver was made.

**7. Relief or Withdrawal of Counsel.** In order to ensure the rights of the accused to representation by qualified counsel at all times, and the orderly progress of Military Commissions is not unduly disrupted, and pursuant to the authority and responsibility found in Reference 1a, paragraph 4A(5) *et. seq.*, whenever detailed counsel or civilian counsel seek to be relieved from detail or withdraw from representation, that counsel must obtain prior permission of the Presiding Officer. The desires of the accused and the state of the proceedings are two, but not all, of the factors which will be considered in deciding the issue.

/s/

Peter E. Brownback III  
COL, JA, USA  
Chief Presiding Officer

Enclosures

1. Notice of Appearance
2. Waiver of Counsel

CIVILIAN DEFENSE COUNSEL  
NOTICE OF APPEARANCE

(DATE)

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2. I understand that practice before Military Commissions requires me to be familiar with Commission Law, to include Presiding Officer Memorandums. Specifically, I have read POM 17, Rules for Appearance, Excusal, and Relief or Withdrawal of Counsel.

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COUNSEL NAME

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UNITED STATES OF AMERICA

v.

NAME

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WAIVER OF PRESENCE OF COUNSEL

(DATE)

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1. I, ACCUSED'S FULL NAME, hereby provide notice to the Presiding Officer that I waive the presence of FULL NAME OF ATTORNEY, my defense counsel for the Commission session scheduled for DATE. By my signature below, I certify that:

a. I have fully discussed this waiver with my defense counsel, NAME OF COUNSEL WITH WHOM DISCUSSED, and he/she has fully advised me of and I understand my right to have my defense counsel present for Commission sessions. I have also been advised and understand that the absence of NAME OF ABSENT ATTORNEY will not delay or defer the business of the Commission whether previously scheduled or arising during the Commission session. I further understand and agree that NAME OF COUNSEL THAT WILL BE PRESENT AT THE SESSION is/are competent and fully capable of representing me and litigating all matters that are scheduled for or may come up at the Commission session. I further certify that this waiver is not made in an attempt to delay the proceedings and in fact will not delay the proceedings.

b. I am voluntarily executing this waiver of counsel after being fully advised of my right to counsel and discussing that right with my defense counsel. No one has threatened me or in anyway forced me to execute this waiver and I believe it is in my best interest to execute it.

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ACCUSED

I/We, NAME OF DETAILED DEFENSE COUNSEL & LEAD DEFENSE COUNSEL (if other than DDC), by my/our signature below, certify to the Presiding Officer that:

1. I/we have fully discussed the substance of this waiver with the accused, NAME OF ACCUSED, and he fully understands its content and impact.

2. This waiver will not in anyway delay or inhibit the business of the Commission, scheduled or that arises at the next session, and this waiver is not offered to delay or defer the business of the Commission.

3. The Detailed Defense Counsel, NAME OF DDC TO BE PRESENT, is fully qualified and competent to litigate all matters that should arise at the scheduled Commission session.

4. I believe it is in the best interest of the accused that he execute this waiver.

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Detailed Defense Counsel/Date

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Lead Defense Counsel/Date